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ARTICLE 23—DEFAULT

Article 23

1. If a party fails to file a statement of defense within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

2. If a party, duly notified under these rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.

I. Introduction

23.01 It is not uncommon for one of the parties to a dispute to seek to derail the arbitral process by refusing to cooperate.[1] Article 23 addresses the situation in which one party to a proceeding 'defaults', whether by failing to file a timely statement of defence, appear at a hearing, produce evidence, or otherwise contravene an order of the tribunal. Unsurprisingly, such a default occurs only where the errant party has

[1] *See generally* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,865–68, 2,439–40.

been duly notified of the steps required[2] and where the party fails to show 'sufficient cause' to excuse its failure. In keeping with international arbitration practice, in such circumstances, the tribunal may choose to proceed with the arbitration regardless of such failure. In contrast to litigation in many jurisdictions, this approach is preferred to issuing any sort of 'summary judgment' or 'default judgment'. In other words, the claimant must still make out his or her case, and the arbitrators must still review the legal and evidential record before making a final determination.[3]

23.02 With the exception discussed below, Article 23(1) closely follows the language in Article 28 of the 1976 UNCITRAL Rules. Of course, even in the absence of Article 23, a tribunal has inherent powers to carry out its adjudicatory function without falling prey to one party's attempts to 'stonewall' the proceeding. The practical importance of these powers is recognized in the UNCITRAL Model Law,[4] in the arbitration laws of several jurisdictions,[5] and in most institutional rules.[6]

II. Textual commentary

A. Failure to file a statement of defence or appear at hearing (Article 23(1) and (2))

Article 23(1)

If a party fails to file a statement of defense within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

[2] *See* ICDR Rules, Art 18 (regarding 'Notices') (discussed above at para 18.01 ff).

[3] *See* Born, op cit, 2,439–40; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1224; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 9-30–9-32; G Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) para 5-125.

[4] *See* UNCITRAL Model Law, Art 25, and Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, as Amended in 2006, para 38:

> Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in co-operating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within limits of fundamental requirements of procedural justice.

[5] *See eg* English Arbitration Act, s 41(4); Netherlands Code of Civil Procedure, Art 1040.

[6] *See eg* ICC Rules, Arts 6 and 21; LCIA Rules, Art 15.8; SIAC Rules, Art 21(3).

Article 23(2)

If a party, duly notified under these rules, fails to appear at a hearing without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may proceed with the arbitration.

23.03 Article 23(1) provides that where a party fails to file a statement of defence, the tribunal 'may proceed with the arbitration'. In other words, while the tribunal retains a broad discretion, the preference is to proceed with the arbitration rather than to resort to the sort of expedited default judgment that might be available in some courts.[7] Were the position otherwise, it might be inconsistent with the arbitrators' Article 16(1) duties to ensure that the parties are treated with equality, that each party has the right to be heard, and that each is given a fair opportunity to present its case.[8] Where the respondent fails to file a statement of defence, he or she will generally not be precluded from responding to the claimant's allegations at a later stage. However, the respondent does so at the risk that he or she may be held to have waived certain arguments.[9]

23.04 While Article 23(1) largely follows the text of Article 28 of the 1976 UNCITRAL Rules, it omits explicit instructions on how to deal with a defaulting claimant. Article 28(1), in contrast, provides that where a claimant fails to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal *shall* terminate the proceeding. The reason for this omission might be because Article 2(3) of the ICDR Rules requires the initiating notice of arbitration to include a 'statement of claim'.[10] However, a claimant (or counter-claimant) might also default in other ways. In the absence in Article 23(1) of any explicit language addressing a defaulting claimant, one can conclude that remedies are left to the tribunal's discretion. Those remedies include exercising the Article 29(2) power to terminate the proceeding.[11]

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[7] *See* D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 714 (discussing analogous 1976 UNCITRAL Rules, Art 28). With respect to the analogous default provision in the AAA Commercial Rules, *see Choice Hotels Intl, Inc v SM Property Management, LLC*, 519 F3d 200 (4th Cir 2008) (upholding *vacatur* of a default arbitral award on the basis that the contract's notice provision had not been fulfilled); cf *Gingiss Intl, Inc v Bormet*, 58 F3d 328 (7th Cir 1995) (upholding a default award where the challenging party had been duly notified in accordance with AAA Commercial Rules requirements).

[8] E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1363 ('There is no obligation on the arbitrators to simply accept the arguments of the party which is present or represented, nor indeed to increase the burden of proof on that party so as to compensate for the other's failure to participate, provided the other party has been properly invited to attend').

[9] For a discussion of waiver under the ICDR Rules, *see* Chapter 25 below.

[10] However, Art 2(3) is only a filing requirement. According to ICDR senior management, 'most, if not all, notices are accompanied by a more detailed statement of claim' (interview of ICDR senior management).

[11] *See* discussion of Art 29(2) at paras 29.08–29.10 below.

23.05 Similarly to paragraph (1), Article 23(2) addresses the situation in which the defaulting party fails to appear at a hearing. Again, the tribunal is afforded broad discretion on how to interpret a non-appearance and what sanctions to employ.[12] As explained, this does not discharge the claimant from its duty to establish that its claims are well-founded in fact and law.

B. Failure to produce evidence or take any other step (Article 23(3))

Article 23(3)

If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, as determined by the tribunal, the tribunal may make the award on the evidence before it.

23.06 Article 23(3) provides that where the default is a failure to 'produce evidence or take any other steps in the proceedings' within the time established, the tribunal 'may make the award on the evidence before it'. Again, the purpose of the provision is to ensure that the arbitration is not stymied by a party's lack of cooperation. The tribunal maintains a broad discretion as to how to deal with such a failure. This includes the possibility of sanctioning the offending party by drawing adverse inferences against it with respect to the evidence not provided.[13]

23.07 For enforcement purposes, and subject to any relevant laws in the enforcing jurisdiction, an award made following default proceedings is to be treated no differently from one made following proceedings in which all parties fully participated.[14] US courts have explicitly adopted this approach in cases involving the ICDR Rules. Thus, in one case,[15] a federal court rejected an argument that '*ex parte* arbitral proceedings offended [the respondent's] due process rights'. The court referred to Article 23 of the ICDR Rules and noted that 'those rules permit proceeding on a default basis if "a party, duly notified under these Rules, fails to appear at

[12] For a tribunal's extensive discussion of a party's failure to appear at a hearing and the decision to proceed with the hearing pursuant to Art 23(2), see ICDR Case No 251-04, 2005 WL 6346380 (ICDR) (including a discussion of the lengths to which the tribunal went to allow the defaulting party an opportunity to participate in some form).

[13] *See generally* JK Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence', 22(4) Arb Intl 549–71 (2006). For an example of an award in which a tribunal relied on its Art 23(3) powers where a party repeatedly failed to produce documents and comply with orders, see ICDR Case No 526-04, 2006 WL 6354057 (ICDR) (tribunal also drew adverse inferences against the offending party in reliance on IBA Rules, Art 9).

[14] *See* Gaillard and Savage (eds), op cit, 1,363 (with reference to Cour d'Appel Paris, 24 March 1995, *Bin Saud Bin Abdel Aziz v Crédit Industriel et Commercial de Paris*, 1996 Rev Arb 259).

[15] *Kirby Morgan Dive Systems v Hydropspace Ltd, et al*, No CV 09-4934, 2010 WL 234791 (CD Calif, 13 January 2010).

a hearing" '.[16] Further, the court noted that the incorporation of the ICDR Rules meant that the arbitration clause was 'self-executing', meaning that the arbitration could proceed without the claimant having to obtain a court order to compel arbitration.[17] Thus, the court refused to 'penalize [the claimant] for [the respondent's] deliberate decision to boycott the arbitration'.[18]

[16] Ibid, *6.

[17] Ibid; *see also Oh Young Indus Co Ltd v E and J Textile Group, Inc*, 2005 WL 2470824 (Cal App 2 Dist 2005).

[18] *Kirby Morgan Dive Systems v Hydropspace Ltd, et al*, No CV 09-4934, 2010 WL 234791, *6 (CD Calif, 13 January 2010).

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